

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

TERRANCE WALKER,

Case No. 3:18-cv-00132-MMD-CLB

v

Plaintiff,

ORDER

INTELLI-HEART SERVICES, INC., et al.,

Defendants.

I. SUMMARY

Pro Se Plaintiff Terrance Walker primarily alleged that Defendants Intelli-heart Services, Inc. (“IHS”), Danny Weisburg, Vanessa Parsons, and Daniel Germain tortiously interfered with his contract with non-party James Winters. (ECF No. 136.) The Court dismissed Plaintiff’s case with prejudice under Nevada’s anti-SLAPP statute, NRS §§ 41.635-41.670 (the “Statute”). (ECF Nos. 206 (“Dismissal Order”), 207 (judgment).) Before the Court are Plaintiff’s motions for reconsideration of the Dismissal Order (collectively, “Reconsideration Motion”) (ECF Nos. 208, 209),¹ and Defendants’ motions for attorneys’ fees and costs (ECF Nos. 210, 213).² As further explained below, the Court will deny the Reconsideration Motion because Plaintiff has presented no valid basis for

¹Defendants filed responses, (ECF Nos. 211, 212, 215, 216), and Plaintiff filed replies (ECF No. 215, 217). Plaintiff appears to have filed two motions because he also objects to Magistrate Judge Carla L. Baldwin's decision to stay discovery in this case (ECF No. 157). (ECF No. 209 at 1.) However, Plaintiff previously objected to that order (ECF No. 162), and the Court previously overruled that objection (ECF No. 190). Moreover, the substance of Plaintiff's second motion for reconsideration still appears to be directed at the Dismissal Order. And considering Plaintiff is proceeding *pro se*, the Court will therefore address the two motions as one motion, and ignore Plaintiff's attempted second objection to Judge Baldwin's decision to stay discovery earlier in this case.

²Plaintiff filed responses (ECF Nos. 218, 219).

1 reconsideration. In addition, the Court will mostly grant both attorneys' fees motions, as
2 the Court must under the Statute.

3 **II. BACKGROUND**

4 Defendant Intelli-heart Services Inc. ("IHS") is a California corporation that
5 provides outpatient, remote heart monitoring services to hospitals and other medical
6 institutions, so they can monitor their patients' hearts while those patients are, say, at
7 home. (ECF No. 136 at 3-4.) "Defendant Vanessa Parsons is the Chief Executive Officer
8 of IHS, and Defendant Danny Weisberg is the President of IHS." (ECF No. 169 at 2.)
9 Defendant Daniel Germain represented IHS as its attorney as relevant to this case. (ECF
10 No. 159 at 2.) The Court otherwise refers to the Dismissal Order, in which it recited the
11 background facts of this case, and does not recite those facts here. (ECF No. 206 at 1-
12 4.)

13 **III. RECONSIDERATION MOTION (ECF NOS. 208, 209)**

14 A motion to reconsider must set forth "some valid reason why the court should
15 reconsider its prior decision" and set "forth facts or law of a strongly convincing nature to
16 persuade the court to reverse its prior decision." *Frasure v. United States*, 256 F. Supp.
17 2d 1180, 1183 (D. Nev. 2003). Reconsideration is appropriate if this Court "(1) is
18 presented with newly discovered evidence, (2) committed clear error or the initial decision
19 was manifestly unjust, or (3) if there is an intervening change in controlling law." *Sch. Dist.*
20 *No. 1J v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993) (citation omitted). But "[a]
21 motion for reconsideration is not an avenue to re-litigate the same issues and arguments
22 upon which the court already has ruled." *Brown v. Kinross Gold, U.S.A.*, 378 F. Supp. 2d
23 1280, 1288 (D. Nev. 2005) (citation omitted). Further, a district court may decline to
24 consider claims and issues that were not raised until a motion for reconsideration. See
25 *Hopkins v. Andaya*, 958 F.2d 881, 889 n. 5 (9th Cir. 1992), *impliedly overruled on other*
26 *grounds in Federman v. Cty. of Kern*, 61 F. App'x 438, 440 (9th Cir. 2003). Said otherwise,
27 it is not an abuse of discretion to refuse to consider new arguments in a reconsideration
28

1 motion. See *Nw. Acceptance Corp. v. Lynnwood Equip., Inc.*, 841 F.2d 918, 925 (9th Cir.
2 1988).

3 Plaintiff has not shown he is entitled to reconsideration of the Dismissal Order in
4 his Reconsideration Motion. For the most part, he merely repeats arguments he already
5 raised, and which the Court considered and rejected—either explicitly or impliedly—in the
6 Dismissal Order. More specifically, Plaintiff first makes an argument based on his status
7 as a self-proclaimed second-tier subcontractor. (ECF No. 208 at 1-4.) But the Court
8 explicitly rejected that argument in the Dismissal Order. (ECF No. 206 at 7-10.) Plaintiff
9 next argues non-party Winters was allowed to contract with Plaintiff because the contract
10 between Winters and IHS did not contain an anti-assignment clause. (ECF No. 208 at 5-
11 6.) But the Court found Winters was not permitted to enter into a contract with Plaintiff
12 under the terms of his contract with IHS. (ECF No. 206 at 2-4, 7-10.) Plaintiff then re-
13 argues that Defendants cannot satisfy the protected activity prong of their motions under
14 the Statute. (ECF No. 208 at 6-7.) But the Court also ruled on that issue. (ECF No. 206
15 at 6-8.) Plaintiff also mischaracterizes the Court’s finding that Plaintiff was unlikely to
16 succeed on his unjust enrichment claim, arguing that the Court found Plaintiff had to have
17 a contract with IHS to assert this claim. (ECF No. 208 at 8-9.) The Court made no such
18 finding in rejecting this same argument in the Dismissal Order. (ECF No. 206 at 9-10.) In
19 general, “[a] motion for reconsideration is not an avenue to re-litigate the same issues
20 and arguments upon which the court already has ruled.” *Brown*, 378 F. Supp. 2d at 1288.
21 Thus, the Court denies Plaintiff’s Reconsideration Motion to the extent it is premised on
22 these arguments.

23 Plaintiff also raises two new arguments in his Reconsideration Motion. Specifically,
24 he argues the Court should have granted him leave to amend when it dismissed his
25 operative complaint (ECF No. 208 at 9), and the Court should have allowed him to
26 conduct discovery before entering the Dismissal Order (ECF No. 209 at 2-3). These
27 arguments also fail to persuade the Court it should reconsider the Dismissal Order. First,
28 the Court is not required to consider new arguments in the Reconsideration Motion. See,

1 e.g., *Nw. Acceptance Corp.*, 841 F.2d at 925. Second, as to dismissal without leave to
2 amend, the Court made explicit findings regarding why it dismissed Plaintiff's operative
3 complaint without leave to amend in the Dismissal Order. (ECF No. 206 at 10.) Third, the
4 Ninth Circuit considered and rejected these two arguments under factually analogous
5 circumstances.³ See *Century Sur. Co. v. Prince*, 782 F. App'x 553, 557 (9th Cir. 2019)
6 (finding the district court did not abuse its discretion in denying the plaintiff the opportunity
7 to conduct discovery and dismissing the complaint without leave to amend). There, as
8 here, Defendants' special motions to dismiss "did not challenge 'the factual sufficiency' of
9 Plaintiff's claims, but rather challenged the fact that the claims targeted good-faith
10 communications." *Id.* (See also ECF No. 206 at 6.) Thus, the Court need not allow Plaintiff
11 discovery, nor must it grant him leave to amend. See *Prince*, 782 F. App'x at 557.

12 In sum, Plaintiff's Reconsideration Motion is denied.

13 **IV. ATTORNEYS' FEES MOTIONS (ECF NOS. 210, 213)**

14 "A strategic lawsuit against public participation, SLAPP for short, is a meritless
15 lawsuit that a plaintiff initiates to chill a defendant's freedom of speech and right to petition
16 under the First Amendment." *Pope v. Fellhauer*, 437 P.3d 171 (Table), 2019 WL 1313365,
17 at *2 (Nev. 2019). If the Court grants a special motion to dismiss under the Statute, as it
18 did here in the Dismissal Order, it must award "reasonable costs and attorney's fees to
19 the person against whom the action was brought[.]" NRS § 41.670(1)(a). However, only
20 attorneys' fees and costs directly attributable to the anti-SLAPP motion(s) are
21 recoverable. See *Prince*, 782 F. App'x at 558. In addition, the Court "may award, in
22 addition to reasonable costs and attorney's fees awarded pursuant to paragraph (a), an
23 amount of up to \$10,000 to the person against whom the action was brought." NRS §
24 41.670(1)(b) (emphasis added).

25

26 ³Indeed, the Court notes Plaintiff relies on *Planned Parenthood Federation of America, Inc. v. Center for Medical Progress*, 890 F.3d 828 (9th Cir. 2018), cert. denied, 139 S. Ct. 1446 (2019), like the plaintiff did in *Prince*. See *Prince*, 782 F. App'x at 557. (See also ECF No. 209 at 1-2.) "But *Planned Parenthood* involved an anti-SLAPP motion under California law, not Nevada law." *Prince*, 782 F. App'x at 557. And the Ninth Circuit found *Planned Parenthood* did not require discovery. See *id.*

All Defendants seek recovery of their attorneys' fees and costs incurred in bringing their anti-SLAPP motions. (ECF Nos. 210, 213.) As discussed, the Court granted Defendants' anti-SLAPP motions, and dismissed this case in its entirety, with prejudice, in the Dismissal Order. (ECF No. 206.) The Statute mandates that Defendants are entitled to recovery of their reasonable attorneys' fees and costs under these circumstances. See NRS § 41.670(1)(a). The Court will thus primarily grant Defendants' attorneys' fees motions. However, the Court declines to award Defendants the additional \$10,000 they all seek. (ECF No. 210 at 10-11, 213 at 6-7.) See also NRS § 41.670(1)(b) (providing through use of the word 'may' that the Court is not required to grant Defendants' requests for these additional amounts). Defendants are therefore entitled to the fee awards they seek, but not their additional requests for \$10,000. The Court addresses the fees motions separately below to discuss certain issues particular to each motion.

A. Defendant Germain's Motion (ECF No. 210)

Defendant Germain states in his motion that he made reasonable efforts to remove any billing entries unrelated to his anti-SLAPP motion, and to the extent any entries are not clearly related to his anti-SLAPP motion, they are recoverable because they would not have been incurred had Defendant Germain not been inappropriately added to this case. (ECF No. 210 at 5.) Plaintiff replies in pertinent part that some of Defendant Germain's billing entries are unrelated to his anti-SLAPP motion and are therefore not recoverable. (ECF Nos. 218 at 8, 218-2 (listing copy-and-pasted billing entries Plaintiff contends are unrelated).) The Court agrees with Plaintiff in pertinent part.⁴

Defendant Germain may only recover attorneys' fees and costs directly attributable to his anti-SLAPP motion. See *Prince*, 782 F. App'x at 558. Not all of his billing entries clearly relate to his anti-SLAPP motion. (ECF No. 210-1 (including entries such as 'review Plaintiff's motion for partial summary judgment').) The Court will therefore direct

⁴To be clear, this does not mean the Court agrees with any of Plaintiff's other arguments in his response to the attorneys' fees motions, which range from irrelevant in the context of the Statute (as to his inability to pay) to frivolous (as to claimed public importance and purported bad faith litigation tactics). (ECF No. 218.)

1 Defendant Germain to submit a revised declaration, seeking a reduced amount of fees
2 and costs, accompanied only by authenticated billing entries attributable to Defendant
3 Germain's anti-SLAPP motion, within 10 days.

4 **B. The IHS Defendants' Motion (ECF No. 213)**

5 Unlike Defendant Germain, Defendants IHS, Parsons, and Weisberg (collectively,
6 the "IHS Defendants"), appear to only seek recovery of costs and fees expended on their
7 anti-SLAPP motion. (ECF No. 213-2 (providing only certain billing entries that all appear
8 related to their anti-SLAPP motion).) Plaintiff offers no argument targeted at the amount
9 of fees and costs the IHS Defendants seek. (ECF No. 218.) Moreover, having considered
10 the IHS Defendants' fees request under LR 54-14 and the factors outlined in *Brunzell v.*
11 *Golden Gate National Bank*, 455 P.2d 31 (Nev. 1969), the Court finds that the IHS'
12 Defendants request is reasonable. The Court awards Defendants 43.6 hours of work
13 multiplied by an hourly rate of \$300.00 per hour for a total of \$13,080.00 in attorneys'
14 fees.

15 The IHS Defendants also seek a 'fees on fees' award—fees incurred in preparing
16 their attorneys' fees motion. (ECF No. 213 at 7.) Plaintiff does not respond to this portion
17 of the IHS Defendants' fees motion, or, as noted above, specifically oppose any particular
18 aspect of the IHS Defendants' fees motion. (ECF No. 218.) The IHS Defendants rely on
19 *Plevin v. City & Cty. of San Francisco*, Case No. 11-CV-2359 MEJ, 2013 WL 2153660, at
20 *6 (N.D. Cal. May 16, 2013) to support their request for fees on fees. (ECF No. 213 at 7.)
21 *Plevin* stands for the proposition the IHS Defendants rely on it for, but *Plevin* was applying
22 California's anti-SLAPP law, not Nevada's. See *Plevin*, 2013 WL 2153660, at *6 ("Fees
23 are also recoverable for the reasonable time spent seeking an award of statutory
24 attorneys' fees.") (citation omitted). NRS § 41.670 does not explicitly address whether
25 fees on fees are recoverable, and the Court was unable to locate any caselaw—and the
26 parties have not brought any to the Court's attention—specifying one way or the other.
27 But "[a]bsent controlling Nevada precedent, Nevada courts look to California law for
28 guidance in interpreting Nevada's anti-SLAPP statute when the relevant provisions are

similar." *Prince*, 782 F. App'x 553 at 557 (citation omitted). The Court therefore finds the IHS Defendants' reliance on *Plevin* persuasive, and finds that the Statute—specifically NRS § 41.670—allows for recovery of fees on fees.

The Court will therefore award the IHS Defendants an additional \$1,590.00 for the preparation of their motion for fees. That means that, in total, Plaintiff must pay the IHS Defendants \$14,670.

V. CONCLUSION

The Court notes that the parties made several arguments and cited to several cases not discussed above. The Court has reviewed these arguments and cases and determines that they do not warrant discussion as they do not affect the outcome of the motions before the Court.

It is therefore ordered that Plaintiff's two motions for reconsideration (ECF Nos. 208, 209) are denied.

It is further ordered that Defendant Daniel Germain's motion for attorneys' fees and costs (ECF No. 210) is granted in part, and denied in part, as specified herein. Defendant Germain must submit a revised declaration supported by billing entries reflecting only time spent on his special motion to dismiss under the Statute within 10 days.

It is further ordered that Defendants Intelli-heart Services Inc., Vanessa Parsons, and Danny Weisburg's motion for attorneys' fees and costs (ECF No. 213) is granted in part, and denied in part. As further specified herein, these Defendants are entitled to \$14,670 in attorneys' fees and costs.

DATED THIS 7th day of April 2020.



MIRANDA M. DU
CHIEF UNITED STATES DISTRICT JUDGE